IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.M.JOSEPH

MONDAY, THE 8TH JANUARY 2007 / 18TH PAUSHA 1928

WP(C).No. 20186 of 2006(C)

PETITIONER:

SANIM SHAH. A.S., PEON,
COLLEGE OF ENGINEERING, THIRUVANANTHAPURAM.

BY ADV. SMT.P.V.ASHA

RESPONDENTS:
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1. **STATE OF KERALA, REPRESENTED BY SECRETARY TO GOVERNMENT, DEPARTMENT OF HIGHER EDUCATION, GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM.**

2. **DIRECTOR OF TECHNICAL EDUCATION, THIRUVANANTHAPURAM.**

BY SR. GOVERNMENT PLEADER SRI. T.T. MUHAMMED

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 08/01/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

WPC.NO.20186/2006 C

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P1: **COPY OF THE ORDER NO.ED3/25463/03 DTD. 14/03/2005.**

EXT.P2: **COPY OF THE ORDER NO.1(1) 26987/2000/DDE/K.DIS. DTD. 16/12/2000.**

EXT.P3: **COPY OF THE CIRCULAR NO.EB3/34915/2005 DTD. 17/12/2005.**

EXT.P4: **COPY OF THE NATIONAL TRADE CERTIFICATE ISSUED TO PETITIONER.**

EXT.P4A: **COPY OF THE NATIONAL APPRENTICESHIP CERTIFICATE ISSUED TO PETITIONER.**

EXT.P5: **COPY OF THE REPRESENTATION DTD. NIL OF PETITIONER TO 2ND RESPONDENT.**

EXT.P6: **COPY OF THE LETTER NO.ED3/6135/2006 DTD. 31/03/2006 OF 2ND RESPONDENT.**

EXT.P7: **COPY OF THE LETTER NO.9644/G3/2006 DTD. 8/06/2006 OF GOVT.**

EXT.P8: **COPY OF THE RELEVANT PORTION OF THE ORDER NO. EB3/34915/2005 DTD. 26/07/06 OF 2ND RESPONDENT.**

EXT.P9: **COPY OF SRO 284/75 DTD. 17/03/75.**

EXT.P10: **COPY OF APPLICATION DTD. 11/10/06 OF PETITIONER TO 2ND RESPONDENT.**

EXT.P11: **COPY OF THELETTER DTD. 9/11/06 OF THE PUBLIC INFORMATION OFFICER OF 2ND RESPONDENT.**

EXT.P12: **COPY OF THE ORDER NO.EB2/2296/2006 DTD. 20/11/06.**

/TRUE COPY/

Kss

K.M.JOSEPH, J.

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WP.(C) No.20186 OF 2006

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Dated this the 8th day of January, 2007

JUDGMENT

Case of the petitioner in brief is as follows:

Petitioner commenced service in the General Education Department on 19.11.1999. Petitioner sought transfer to the Technical Education Department and by order dated 14.3.2005 (Ext.P1) petitioner was transferred as Peon in the Technical Education Department. Petitioner joined as Peon on 23.3.2005. In the order granting transfer, it is categorically stated that petitioner has to complete probation for a period of one year from the date of joining duty. Petitioner had already completed probation in the category of Peon in the General Education Department with effect from 20.11.2000 as evident from Ext.P2 order dated 16.12.2000. Petitioner approached the second respondent against the condition in Ext.P1. Ext.P6 was issued by the second respondent stating that he has to complete probation afresh. However, the request of the petitioner before the Government was disposed of by Ext.P7 stating that petitioner need not undergo probation again. But it is stated that petitioner would have to be ranked

below probationers, approved probationers and full members. Ext.P3 is a Circular dated 17.12.2005 issued by the Director calling for details of the last grade servants who possess the requisite qualification for the post of Tradesman in various branches of the Department. Petitioner passed the course of training in the trade of Turner from ITI in February 1990. He has also undergone apprenticeship and passed the trade test conducted by National Council for Vocational Training held in May, 1995. Exts.P4 and P4(a) are the certificates. Petitioner submitted an application and the application was forwarded to the second respondent. Ext.P8 is however issued, in which 56 last grade servants are appointed as Tradesman. Petitioner was not appointed as Tradesman. Petitioner seeks to declare that he is entitled to be considered for appointment as Tradesman against any vacancy which arose after his joining the department and to command the second respondent to consider his case for appointment by transfer as Tradesman against the vacancies which arose in the department after his joining the Department and to appoint him with effect from the date of Ext.P8. A declaration is sought against the condition in Ext.P1 that

he has to be on probation. Declaration is also sought against the statement in Ext.P7 that the petitioner will be junior to even the probationers in the department.

2.Counter affidavit is filed, wherein it is inter alia stated as follows:

Reference is placed on Special Rule G.O.(P) dated 17.3.1975. It is stated that transfer appointment as per proceedings dated 26.7.2006 were to the vacancies which arose due to the promotion of some Tradesman as Trade Instructor. It is stated that all those who were eligible as on 31.12.2005,(Government Pleader submits that it is 2004) were appointed as Tradesman and the petitioner was not eligible at that time. It is stated that as per the Special Rule the second method of appointment being direct recruitment, all the remaining vacancies after the by transfer appointment were to be reported to the Public Service Commission. It is pointed out that as per the clarification from the Government though the probation of the petitioner need not be declared afresh, he was the junior most at the time of his entry in to the department. All the incumbents considered in the order dated

26.7.2006 are those who joined on or before 31.12.2004 and none of those who joined on or after 1.1.2005 are included in that order.

3. Reply affidavit is filed producing Exts. P9 to P12. Ext.P9 dated 17.3.1975 is the Special Rule referred to in the counter affidavit. It is contended that only in the absence of qualified hands from among members of Last Grade Service eligible for transfer, direct recruitment is permissible. It is pointed out that on the basis of information vide Ext.P11 there are vacancies and it is also pointed out that 12 vacancies were reported to the Public Service Commission.

4. Learned counsel for the petitioner Smt. P.V.Asha would submit that there is no basis to deny appointment to the petitioner as Tradesman along with those who were appointed as per Ext.P8. Ext.P8 is not under challenge. She would submit that there is no complaint against those who were promoted. According to her the condition in Ext.P1 in the light of Ext.P7 may not stand against the petitioner as Government has clarified in Ext.P7 that she need not undergo probation. But then, she would submit that Ext.P7 to the extent that the petitioner is to be treated as junior to even probationers is

unsustainable. In that regard she took me through the provisions of Rules 2(k), 3, 10 and 17(d) of the Special Rules in the last grade service. Rules 3 and 10 are extracted hereunder:

> "3. Applicability of General Rules.- Part II of the Kerala State and Subordinate Services Rules other than rules 3, 4, 9, 10(c), 14, 15, 16 and 17 shall not apply to the service."
>
> 10. Service in a category in different departments or offices.- Subject to the provisions of sub-rule (d) of rule 17 service rendered in a post included in any one of the categories in a department or office shall count for probation and seniority in regard to another post in the same category whether in the same or another department of office."

Under Rule 2(k), peon is included under posts coming under category 2. She would point out that in the light of the provisions of Rule 10 it is crystal clear that a person who undergoes probation need not undergo probation all over again in relation to the post of Peon falling in category 2(k) of the Rules. It is her case that Rule 10 applies and even without undergoing probation petitioner was entitled to be appointed as Tradesman having regard to the fact that he had acquired

qualification way back in 1995. She would submit that the interpretation in Ext.P7 that the petitioner is to rank even below probationers is unsustainable. According to her a perusal of Rule 17 (d) would show that the rule making authority has used the word 'or' after approved probationers and before full members and the words 'as the case may be'. According to her this would show that a person who has completed his probation in another department and transfered would be junior to approved probationers and full members only. According to her the reference to probationer in Rule 17(d) is apposite only in a case where a person is transferred on request is undergoing probation in the original department. She also relied on Rule 27(a) of K.S. & S.S.R to the effect that an interdepartmentally transferred person will take the bottom seniority, that is with reference to the date of joining that duty. She would submit that there are vacancies as is evident from Exts.P10and P11 and only because petitioner has come on interdepartmental transfer she is being denied the right.

5. Per contra, learned Government Pleader reiterated the contentions in the counter affidavit. He would in fact submit that there

are persons who were appointed before the petitioner joined and it is submitted that none of the persons who have joined the department after the petitioner has joined the department has been appointed as Tradesman. He would submit that having regard to the purport of Rule 17(d), petitioner cannot stake a claim to steal a march over even a probationer. According to the Government Pleader the action is strictly in terms of Ext.P7 and all the incumbents considered in Ext.P8 order had joined duty prior to 31.12.2004 and none of those who joined after 1.1.2005 were included in the order.

6. It is not in dispute that Ext.P9 is the Government Order providing for appointment to the post of Tradesman. The appointment is contemplated by transfer from among last grade servants employed in the Technical Education Department. It is further clear from Ext.P9 that only in the absence of qualified hands among the members of last grade service direct recruitment is permissible.

7. The fundamental question to be decided is the validity of the condition imposed in Ext.P1 that while the petitioner need not undergo probation again in the Technical Education Department, he will be

ranked even below probationers. Rule 10 provides that service rendered in a post included in any of the categories in the department shall count for probation and seniority in regard to a post in the same category in the same or another department. Thus probation undergone in the post of Peon in the General Education Department by the petitioner would count in the department to which he was transfered even for the purpose of seniority. But this is subject to an exception and that exception is carved out by the provisions of sub rule (d) of Rule 17. Sub rule (d) of Rule 17 deals with a situation where a persons seeks a transfer or makes a request for transfer. It is in such circumstances that sub rule (d), which should be read along with Rule 10 applies. Rule 17(d) provides that a person who is transferred will rank as junior to three categories namely, probationers, approved probationers or full members. Then the question to be considered is whether having regard to the appearance of the word probationer, what is the meaning given to the word probationer. There are two ways of looking at it. The first way of looking at it as contended by the learned counsel for the petitioner, which is that a person will rank below the

probationer only when he is undergoing probation and he is transferred. The other way of looking at it is that even a person who has completed his probation will loose his seniority against a person who is on probation in the other department to which he is transferred.

8. I would think that the contention raised by the petitioner that it is only when a person who has not completed the probation in the original department is transferred he would be ranked below the probationer in the new department cannot be accepted. Unlike the transfer issued in public interest, this is a case where the petitioner is coming to a new department on his own request. Rule 17(d) unmistakably says that petitioner has to forego the right to seniority based on Rule 14 and that he will have to take his rank as last in the list of probationers, approved probationers or full members. The interpretation placed by Smt. P.V.Asha would in my view defeat the object of the rule. Rule 14 provides for seniority of a member with reference to the date of his first appointment. It is this seniority which would normally protected under Rule 10. That is in a case where a person is transferred otherwise than on request. But in a case where a

person is transferred on his own request apparently this right under Rule 14 which entitles a person to stake a claim for seniority based on the date of his first appointment is lost. The seniority of a person in the department to which he is transferred is to be determined on the basis of his first appointment. If that be so, even if he is a probationer, the fact that a person who has completed his probation in another department takes a transfer cannot rob him of his rights under Rule 14. It would be inconsistent with the purport of Rule 17(d) to allow a person who seeks a request transfer to lay a claim for seniority over a probationer in the new department, who in fact would be entitled to lay claim to seniority in terms of Rule 14 on the basis of his first appointment. Apparently when the later has been appointed earlier and he is undergoing probation and his seniority is to be determined with reference to his date of appointment, that seniority would be taken away by the acceptance of the interpretation which is placed by the petitioner, which I reject as untenable.

9. Learned counsel for the petitioner relied on the decision reported in **Subramaniam Shanmugham v. M.L.Rajendran** ((1987) 4 SCC 215), in which the Apex Court held as follows:

> "The meaning of the expression "as the case may be" is what the expression says, i.e., as the situation may be; in other words in case there are separate and distinct units then concept of need will apply accordingly. Where, however, there is no such separate and distinct unit, it has no significance."

I would think that in the context of Rules 10, 14 and 17(d) together the result is inevitable, that the person who requests for transfer, be it is a peon, he will take bottom seniority even as against a probationer. The words "as the case may be" in the context of Rule 17(d) cannot yield no other reasonable result. The words "as the case may be" is to be understood as meaning that in respect of persons falling each of the categories, the person who takes request transfer will take bottom seniority.

10. According to learned counsel for the petitioner however, the

fact that under Ext.P7 the petitioner will be ranked below the probationers, approved probationers and full members cannot be the end of the matter. Government have clarified the matter that the petitioner need not undergo probation again in the Technical Education Department. Petitioner being fully qualified and the petitioner having completed probation in the General Education Department in the year 2000, the petitioner must be appointed in the post of Tradesman, no doubt, taking note of the seniority from among the applications of qualified applicants, she submits. She would submit that even after providing for all probationers, approved probationers and full members among those who applied, petitioner should be appointed as Tradesman as against the vacancy having regard to Ext.P9. I feel that this is a matter to receive the consideration of the Director, the second respondent.

While rejecting the prayer to declare Ext.P7 bad, there will be a direction to the second respondent to consider whether the petitioner can be accommodated in the light of Ext.P9 order against a vacancy on the basis that the petitioner would rank as junior to the probationers,

approved probationers and full members as provided in Ext.P7 in accordance with law and take a decision in accordance with law within a period of six weeks from the date of receipt of a copy of this judgment after hearing the petitioner also.

(K.M. JOSEPH, JUDGE)

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K.M.JOSEPH, JJ.

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W.A. No. OF

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JUDGMENT

Dated this the day of February, 2006.